

## THE DEATH OF AFFIRMATIVE ACTION?

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### INTRODUCTION

The United States Supreme Court recently heard *Fisher v. University of Texas*,<sup>1</sup> a case brought by a young woman who claims that she was discriminated against in the Texas undergraduate admissions process.<sup>2</sup> Scholars and commentators on the left and right predict that *Fisher* marks the inevitable death of affirmative action, despite Justice Sandra Day O'Connor's edict in *Grutter v. Bollinger*<sup>3</sup> that twenty-five more years of "diversity" in law schools would be needed in order to achieve worthy societal goals.<sup>4</sup> Justice Elena Kagan recused herself; she served as United States Solicitor General and filed a brief when the case was before the Fifth Circuit.<sup>5</sup> Affirmative action may not be dealt its death blow just yet, but the need for reflection on the policy seems clear.

Our nation's history is replete with examples of exclusion and barriers to higher education. Throughout the first half of the twentieth century, and into the 1960s, blacks were not alone in experiencing the impacts of Jim Crow. Jewish students were denied admission at the

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\* Everett Fraser Professor of Law at the University of Minnesota; Professor of Medicine and Public Health at the University of Minnesota. © Michele Goodwin. I would like to thank Allison Whelan, my research assistant. Roughly twenty-five years ago, I met Professor James Jones, a cantankerous professor, rumored to inspire fear in his students and some of his colleagues. Barely eighteen years old, I somehow found myself regularly in his office—though I was not a law student, nor at that time necessarily interested in attending law school. I was, however, transfixed by our conversations—their breadth, depth, rigor, and intellectual scope.

Jim's journey to the law school—first as a student and later as a professor changed not only his life, but that of countless others. Jim was the first person to racially integrate the faculty at the University of Wisconsin and one of its few black law students in the 1950s. By the time Jim joined the faculty in 1969—thirteen years after graduating—very little had changed in the racial integration of law schools, either in the professorate or the student bodies. These were the facts of the time. Many credit Jim, and rightfully so, with spearheading the most dynamic integration of the legal academy through establishing the William H. Hastie Fellowship.

1. No. 11-345 (U.S. argued Oct. 10, 2012).

2. 631 F.3d 213, 217 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012).

3. 539 U.S. 306 (2003).

4. *Id.* at 343.

5. Jess Bravin, *Justices to Revisit Race Issue*, WALL ST. J., Feb. 22, 2012, at A3.

nation's most elite law and medical schools.<sup>6</sup> "Quotas" were put in place to exclude "too many" Jews from swelling the ranks of the legal profession;<sup>7</sup> Northwestern Law School was controversially associated with discrimination against Jewish applicants (and blacks)<sup>8</sup> as were other law schools and the legal profession more generally. In other words, what it means to be "qualified" for law school admission in the United States invites scrutiny because of historical patterns of ethnic bias and stereotyping in higher education and subsequent employment.<sup>9</sup>

In her path-breaking ethnography, *New York Jews and the Great Depression: Uncertain Promise*, Beth Wenger explains that "Jews felt doubly beleaguered by the rising tide of job discrimination."<sup>10</sup> Indeed, "[e]ven young Jews who remained in school . . . could not escape discrimination. . . . [as] elite private colleges imposed a quota system for Jewish admission . . . ."<sup>11</sup> During the first half of the twentieth century, "many law schools had introduced 'character' criteria in their admissions policies and the percentage of Jewish law students" predictably declined

6. E.g., Edward C. Halperin, *The Jewish Problem in U.S. Medical Education, 1920–1955*, 56 J. HIST. MED. & ALLIED SCI. 140 (2001).

7. See, e.g., Marcia G. Synnott, *Numerus Clausus (United States)*, in 2 ANTISEMITISM: A HISTORICAL ENCYCLOPEDIA OF PREJUDICE AND PERSECUTION 514, 514–15 (Richard S. Levy ed., 2005); Fred M. Hechinger, *About Education; The Trouble with Quotas*, N.Y. TIMES, Feb. 10, 1987, at C1 ("In the 1920's prestigious colleges used overt or covert quotas, mainly against Jews."); Debra Cassens Weiss, *Ruth Bader Ginsburg Worked Harder to Beat Jewish Quotas*, A.B.A. J., (Jan. 15, 2008, 8:11 AM), [http://www.abajournal.com/mobile/article/ruth\\_bader\\_ginsburg\\_worked\\_harder\\_to\\_beat\\_jewish\\_quotas](http://www.abajournal.com/mobile/article/ruth_bader_ginsburg_worked_harder_to_beat_jewish_quotas).

8. See, e.g., JAY PRIDMORE, NORTHWESTERN UNIVERSITY: CELEBRATING 150 YEARS 180 (2000). Similarly, Irish immigrants suffered against racial stereotypes that stigmatized their communities and restricted opportunities in education and employment. JAY P. DOLAN, *THE IRISH AMERICANS: A HISTORY* 62 (2008). The Irish were thought to be unteachable and "barbarians." *Id.* According to Theodore Parker, "[t]he Irish are ignorant, and, as a consequence thereof, are idle, thriftless, poor, intemperate, and barbarian." *Id.* (emphasis added). His was a popular sentiment at the time, repeated by educators, politicians, employers, and embraced widely by non-Catholic Americans. *Id.*

9. JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 186–88* (1976). Auerbach presents a compelling narrative about the persistence and collateral costs of discrimination against Jews as law school applicants, students, and subsequently lawyers and potential law professors. In a moving passage, he quotes Felix Frankfurter as having wondered "whether [Harvard] shouldn't tell Jewish students that they [matriculate] at their own risk" of ever landing a legal job commensurate of their merit and legal training. *Id.* at 186. For example, even Jewish law review editors were barred from the ranks of partnership at prestigious law firms until after World War II. *Id.*

10. BETH S. WENGER, *NEW YORK JEWS AND THE GREAT DEPRESSION: UNCERTAIN PROMISE* 23 (1996).

11. *Id.*

as such measures likely served as proxies to suppress admission.<sup>12</sup> In his detailed account of legal education from 1850–1980, Robert Stevens explains that “the Yale Board of Admissions was deeply concerned about ‘the Jewish problem.’”<sup>13</sup> Even legal politicians were concerned that Jews entering the legal profession “might undermine the American way of life.”<sup>14</sup>

Notwithstanding the eventual dismantling of barriers, in spheres of law and medicine, Jews experienced pernicious forms of discrimination in higher education. According to David Oshinsky, Cornell University, Columbia University, the University of Pennsylvania, and Yale University implemented “rigid” quotas to bar Jewish students from their medical schools.<sup>15</sup> He notes that a Yale medical school dean emphatically instructed: “[n]ever admit more than five Jews, take only two Italian Catholics, and take no blacks at all.”<sup>16</sup> Oshinsky suggests that this is a reason why Jonas Salk, who discovered the polio vaccine, attended City College of New York and New York University rather than its more elite cousins.<sup>17</sup>

This Tribute urges a more robust examination of affirmative action policies applied in the United States. It suggests that there is more to be said about affirmative action than the narrow, predictable frames typically accounted for in the literature that places race at the center of the debate. Rather, this Tribute takes up the role of gender and the middle-class white family. On the one hand, it makes the case that legal scholarship has overlooked that affirmative action benefits middle class white families.<sup>18</sup> On the other hand, it explains that, overwhelmingly, the lead litigants opposing affirmative action have been white women. The Tribute concludes challenging scholars and educators to think beyond traditional frames and to critique who really benefits from and who is left behind in the application of contemporary affirmative action practices in the United States.

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12. *Id.*; ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 100–01 (1983); *see also* JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 255 (1950) (explaining that “arguments favoring avowed quota systems for admission to law schools and to the bar were under sharp suspicion as covert devices of anti-Semitism.”).

13. STEVENS, *supra* note 12, at 101.

14. *Id.* at 100–01.

15. DAVID M. OSHINSKY, *POLIO: AN AMERICAN STORY* 98 (2005).

16. *Id.*

17. *Id.*

18. Due to page constraints, this Tribute takes up a very narrow slice of a complex dialogue on white families and affirmative action. The page limits do not provide for a more detailed discussion of the topic than to succinctly articulate a few key points. A work in progress expounds in greater detail on the themes emerging from this work.

## REFRAMING THE DEBATE: AFFIRMATIVE ACTION AND WHITE WOMEN

For all the handwringing over affirmative action, few commentators consider who benefits from the platform and whether or not (and for whom) it achieves its goals. Some of this may be difficult to deduce, but few scholars bother to sift through the broader sets of data. For example, while blacks may perceive themselves as the primary beneficiaries of affirmative action, whites might mistakenly hold that view too.<sup>19</sup> In other words, white women may not recognize the entitlements they gained due to affirmative action.<sup>20</sup> In part, the dialogue about affirmative action misses much due to how the debates are framed. For example, one significant omission from the affirmative action literature is the benefit to white families; after all, affirmative action policies opened the doors to small business ownership,<sup>21</sup> education,<sup>22</sup> and sports for white women.<sup>23</sup> For all the law review articles on the constitutionality of affirmative action, the displacement of whites, and the stigmatization of minorities, few venture to study the uplift of white families based on affirmative action. One reason why this might be is that whites feel stigmatized by affirmative action or misperceive it as exclusively benefiting blacks and Latinos. Empirical studies demonstrate the illusory nature of those perceptions.<sup>24</sup>

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19. Tim Wise, *Is Sisterhood Conditional? White Women and the Rollback of Affirmative Action*, 10 NAT'L WOMEN'S STUD. ASS'N J., Autumn 1998, at 1, 8 (discussing the "racialization" of discussions about affirmative action).

20. See *id.* at 1–2 (noting that, "[d]espite the benefits that have accrued to . . . white women as a result of affirmative action, there has been an alarming silence on the part of most white women" in support of such policies).

21. *Id.* at 4.

22. See *id.*

23. Title IX is a law passed in 1972 that requires gender equity for males and females in every educational program that receives federal funding, including athletics. Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235, 373–75 (1972) (codified as amended at 20 U.S.C. §§ 1681–88 (2006)).

24. E.g., Wise, *supra* note 19, at 3. For example, with federal, state, and university affirmative action policies from 1972 to 1993:

The percentage of women architects increased from 3% to nearly 19% of the total;

The percentage of women doctors more than doubled from 10% to 22% of all doctors;

The percentage of women lawyers grew from 4% to 23% of the national total;

The percentage of female engineers went from less than 1% to nearly 9%;

The percentage of female chemists grew from 10% to 30% of all chemists; and,

The percentage of female college faculty went from 28% to 42% of all faculty.

*Id.*

Ironically, if affirmative action “dies,” some might argue that its demise is proof of its success for white women. After all, they claim, the *Fisher* case is brought by a white woman, and empirical data points to women as the primary beneficiaries of affirmative action and civil rights laws, particularly in education (and business).<sup>25</sup> Consider this: thirty years ago at some of the nation’s most elite schools, such as Dartmouth, barely a handful of women were in the graduating classes; or consider that law schools, now just about at parity, refused to admit “qualified” women applicants.<sup>26</sup> Some commentators could argue that the experiences of white women in these contexts differ from that of blacks, because the former were qualified and the latter simply were not. Such arguments offer a seductive refrain that suggests policies to advance the progress of white women are corrective, but for persons of color they are unwarranted and unearned entitlements.

Indeed, similar arguments served as the legal foundation for excluding talented blacks in the south from attending their state institutions in Maryland, Alabama, Arkansas, Kentucky, Louisiana, Mississippi, Tennessee, and other states.<sup>27</sup> The late Supreme Court Justice Thurgood Marshall, a Baltimore native, applied to Howard University Law School rather than the University of Maryland because the state’s flagship law school refused to admit blacks.<sup>28</sup> Yet, notice parallel justifications for the exclusion of women in law. Esteemed jurists, lawyers, and law professors claimed that women were not cut out for the rigors of law<sup>29</sup>—their brains were too prone to melancholia and their hearts too wide and open to handle the fouler side of law (reading daily about battery, rape, and murder).<sup>30</sup> The Wisconsin Supreme Court’s holding in *In re Goodell* provides a relevant and potent example worth capturing in extended detail for this Tribute:

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25. Wise, *supra* note 19, at 3–4.

26. See Cynthia Fuchs Epstein, *The Myths and Justifications of Sex Segregation in Higher Education: VMI and the Citadel*, 4 DUKE J. GENDER L. & POL’Y 101, 102–03 (1997); Deborah L. Rhode, *Midcourse Corrections: Women in Legal Education*, 53 J. LEGAL EDUC. 475, 477–78 (2003).

27. Gil Kujovich, *Equal Opportunity in Higher Education and the Black Public College: The Era of Separate but Equal*, 72 MINN. L. REV. 29, 30 n.1 (1987) (discussing “[t]he southern and border states . . . that maintained a rigid system of segregation in public higher education during the separate but equal era”).

28. JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 52–53 (1998).

29. See *In re Goodell*, 39 Wis. 232, 245 (1875) (“Nature has tempered woman as little for the juridical conflicts of the court room, as for the physical conflicts of the battle field. Womanhood is moulded for gentler and better things.”).

30. *Id.* at 244–46.

We cannot but think the common law wise in excluding women from the profession of the law. . . . The law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race and for the custody of the homes of the world and their maintenance in love and honor. . . . There are many employments in life not unfit for female character. The profession of the law is surely not one of these. The peculiar qualities of womanhood, its gentle graces, its quick sensibility, its tender susceptibility, its purity, its delicacy, its emotional impulses, its subordination of hard reason to sympathetic feeling, are surely not qualifications for forensic strife.<sup>31</sup>

This type of rhetoric boldly proclaimed women intellectually unfit for legal reasoning. When delivering the Madison Lecture at New York University Law School, then Associate Supreme Court Justice Sandra Day O'Connor quoted a speech given by Clarence Darrow—a “champion[] of unpopular causes”—that echoes similar stereotypes, recalling the famous lawyer telling a group of women: “You can’t be shining lights at the bar because you are too kind. You can never be corporation lawyers because you are not cold-blooded. You have not a high grade of intellect. I doubt you can ever make a living.”<sup>32</sup>

In later years, some judges refused to hire women as law clerks.<sup>33</sup> For example, Justice Felix Frankfurter passed on hiring a young Ruth Bader Ginsburg despite her election on Harvard’s and Columbia’s law reviews and graduating first in her law school class.<sup>34</sup> In an interview,

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31. *Id.* at 244–45.

32. Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U. L. REV. 1546, 1548 (1991).

33. Michael J. Klarman, *Social Reform Litigation and Its Challenges: An Essay in Honor of Justice Ruth Bader Ginsburg*, 32 HARV. J.L. & GENDER 251, 268 (2009) (noting that even Justice William Brennan, “the most liberal justice of the 1970s, . . . refused to hire female law clerks for many years”).

34. *Interview with Justice Ruth Bader Ginsburg*, ACAD. OF ACHIEVEMENT (Aug. 17, 2010), <http://www.achievement.org/autodoc/printmember/gin0int-1>. According to Justice Ginsburg:

Justice Frankfurter, like his colleagues, was just not prepared to hire a woman. Now these were pre-Title VII days, so there was nothing unlawful about discriminating against women. And gentlemen of a certain age at that time felt that they would be discomfited by a woman in chambers, that they might have to watch what they say, they might have to censor their speech. It was surprising that Frankfurter had that typical—in those days—reaction, because he was the first justice to hire an African American as a law clerk some years before. But as I said, like many other federal judges of the time, he just wasn’t prepared to hire a woman.

*Id.*

Justice Ginsburg recalled a dinner with Harvard Law School's dean, Erwin Nathaniel Griswold (who later became Solicitor General) during her first year of law school:

The dean in those days had a dinner early in the term for all the women in the first-year class . . . [and] after dinner he brought us into his living room, and each of us sat next to a distinguished professor, invited to be our escort, and he asked [us] to tell him what we were doing in the law school occupying a seat that could be held by a man. . . . There were still some doubting Thomases on the faculty, and the dean wanted the women's answers about what they were doing in law school to arm him with responses to those members of the faculty who still resisted admitting women.<sup>35</sup>

One need not reach back a full century to observe women's exclusion in higher education (and the workplace); as recently as the 1970s and 1980s, gross disparities plagued admissions and hiring processes. White women were regularly denied admission to historically male colleges. Years before, women's colleges benefited from the status quo gender discrimination because talented young women were denied admission into the Ivy League schools.<sup>36</sup>

As recently as 1996, Virginia fought to maintain policies that excluded women from its male military academies, finally losing in a Supreme Court battle against the Clinton administration.<sup>37</sup> The Supreme Court warned that such policies were discriminatory and required "exceedingly persuasive justification" to pass constitutional muster.<sup>38</sup> Justice Ruth Bader Ginsburg opined that such policies perpetuated stereotypes, stigmatized women, and discouraged women from applying.<sup>39</sup>

Affirmative action and civil rights policies unlocked the doors for white women in the academic halls of the elite universities, while also advancing a (now) settled point: that white women deserve a place in business schools, law schools, medical schools, engineering departments,

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35. *Id.*

36. *See, e.g.,* Wendy Kaminer, *The Trouble with Single-Sex Schools*, ATLANTIC MONTHLY, Apr. 1998, at 22 (discussing how the "Seven Sisters" colleges "evolved into a female Ivy League, educating the daughters of elites and providing social and professional mobility to some members of the middle class").

37. *See United States v. Virginia*, 518 U.S. 515, 519, 523–30 (1996).

38. *Id.* at 531.

39. *Id.* at 541–43.

and math departments.<sup>40</sup> As such, white women as well as other “minorities” leveraged civil rights laws, and colleges and universities, in response, had an incentive to broaden the scope of their admissions criteria to offer women fair opportunities to gain admission.

The *Fisher* case and affirmative action debates deserve more than a passing glance and reductive argumentation (framed only within the context of race), because post-*Regents of the University of California v. Bakke*<sup>41</sup> individuals suing universities for discrimination against them in the academic admissions process have been white women: Abigail Fisher (*Fisher v. University of Texas*<sup>42</sup>); Barbara Grutter (*Grutter v. Bollinger*<sup>43</sup>); Jennifer Gratz (*Gratz v. Bollinger*<sup>44</sup>); and Cheryl Hopwood (*Hopwood v. Texas*<sup>45</sup>). That white women led the charge against affirmative action in these cases is worthy of note for a few reasons. First, white women benefit significantly from state and federal affirmative action programs (in higher education,<sup>46</sup> small business loans,<sup>47</sup> and government contracts<sup>48</sup>) and in the private sector with hiring and recent efforts to diversify boards of Fortune 500 companies.<sup>49</sup> Second, prior to revamped admissions practices in direct response to civil rights laws, women had much less possibility of success in suing a university to admit them. Discrimination in education and employment defined the norms for three-quarters of the last century. In Barbara Grutter’s case, with the exact same academic record, commentators are doubtful that she would have been admitted to the University of Michigan prior to 1975—as she was also an “older” student when she applied.<sup>50</sup> Civil-rights laws changed that; now protections exist to shield “older” students from discrimination.<sup>51</sup>

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40. This is an important point; white women did not suddenly become smarter in the 1970s, 1980s, and 1990s and thus better qualified for admissions. Civil rights laws prevented universities that receive federal funding from discriminating against minority groups, and white women were included under that umbrella. For example, Title IX of the Education Amendments of 1972 prohibits sex discrimination by any educational program or activity receiving federal funds. 20 U.S.C. § 1681(a) (2006).

41. 438 U.S. 265 (1978).

42. 631 F.3d 213, 217, 228 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012).

43. 539 U.S. 306, 316–17 (2003).

44. 539 U.S. 244, 251–52 (2003).

45. 78 F.3d 932, 938 (5th Cir. 1996).

46. Wise, *supra* note 19, at 4.

47. *Id.* at 3–4.

48. *Id.* at 4.

49. See Bianca Bosker, *Fortune 500 List Boasts More Female CEOs Than Ever Before*, HUFFINGTON POST (May 7, 2012, 12:34 PM), [http://www.huffingtonpost.com/2012/05/07/fortune-500-female-ceos\\_n\\_1495734.html](http://www.huffingtonpost.com/2012/05/07/fortune-500-female-ceos_n_1495734.html).

50. See, e.g., Transcript of Oral Argument at 54, *Gratz v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) (arguing “Barbara Grutter would not have been admitted under



Third, in each of these landmark affirmative action cases, white men were admitted with lower test scores than the women suing the institutions for racial discrimination,<sup>52</sup> raising the question as to why race and not gender? Or, why attack race in admissions rather than legacy policies?

#### AFFIRMATIVE ACTION AND BENEFITS TO WHITE FAMILIES?

In casting affirmative action as a race-based policy, primarily for benefit to poor blacks and Latinos, much is lost relevant to a broader socioeconomic study. For example, what are the economic benefits derived by white families due to affirmative action? Arguably, if scholars can credibly claim that affirmative action benefits black families and communities by increasing their wealth, the same could be offered and measured for white families. Understood as such, affirmative action has likely benefited white families socially (as a source of pride that results from members of a family attending and graduating from college and graduate school) and economically. The extent of these benefits, particularly the economic, is yet to be fully understood. However, it is important to comb through the data with this in mind. At least some of the economic uplift of the middle class and upper-income white families may be attributed to affirmative action policies.<sup>53</sup>

As pundits consider the future of affirmative action, aspects of its legacy in the United States should be placed into clearer view, while crafting new strategies. For example, how does affirmative action fit into other contemporary debates involving Asian Americans, Latinos, or

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a race-blind program"); Fiona Kay & Elizabeth Gorman, *Women in the Legal Profession*, 4 ANN. REV. L. & SOC. SCI. 299, 300 (2008) (noting that women continued to be denied admittance to U.S. law schools in the 1960s and that "[i]n 1970, women comprised 8% of the total law school enrollments in the United States"); Pam Adams, *Reverse Discrimination Claim Absurd*, Copley News Service, Jan. 29, 2003 (noting that "white females have been the greatest beneficiaries of affirmative action"). "Grutter applied 18 years after graduating from college." Plaintiff's Memorandum of Law in Support of Motion for Partial Summary Judgment on Liability, *Grutter v. Bollinger*, 16 F. Supp. 2d 797 (E.D. Mich. 1998) (No. 97-CV-75928-DT), available at [http://www.cir-usa.org/legal\\_docs/grutter\\_v\\_bollinger\\_summary.pdf](http://www.cir-usa.org/legal_docs/grutter_v_bollinger_summary.pdf).

51. For instance, 42 U.S.C. § 6102 (2006) prohibits discrimination based on age in "any program or activity receiving Federal financial assistance."

52. A survey by Scott Jaschik, editor of *Inside Higher Ed*, found that "[m]en are being admitted with lower grades and test scores" than other demographics. Rob Mank, *Men Far More Likely to Benefit from Affirmative Action in College Admissions*, CBS NEWS (Sept. 26, 2011, 12:06 PM), [http://www.cbsnews.com/8301-503544\\_162-20111646-503544.html](http://www.cbsnews.com/8301-503544_162-20111646-503544.html) (quoting Scott Jaschik).

53. Richard Kahlenberg, *Three Myths about Affirmative Action*, CHRON. HIGHER EDUC. (Mar. 29, 2012, 4:42 PM), <http://chronicle.com/blogs/innovations/three-myths-about-affirmative-action/32084>.

Mexican-born Americans?<sup>54</sup> Should affirmative action policies apply to non-U.S. citizens (i.e., people of color from foreign nations)? What are the implications of affirmative action practices that significantly swell the ranks with foreign-born blacks? Should nationality matter at all? Importantly, who remains left behind in the contemporary approach to affirmative action? Finally, should race matter at all—why not simply focus on socioeconomic status? These questions offer a starting point in a more nuanced approach to how we will educate future generations of Americans.

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54. Asian American students claim discrimination because whites with lower test scores gain admission to elite schools when they have been passed over. *See, e.g.*, Daniel Golden, *Harvard Targeted in U.S. Asian-American Discrimination Probe*, BLOOMBERG (Feb. 2, 2012, 4:01 AM), <http://www.bloomberg.com/news/2012-02-02/harvard-targeted-in-u-s-asian-american-discrimination-probe.html>; Julianne Hing, *U.S. Dept of Ed Inquiry: Do Harvard and Princeton Discriminate against Asian-American Students?*, COLORLINES (Feb. 10, 2012, 10:03 AM), [http://colorlines.com/archives/2012/02/us\\_dept\\_of\\_ed\\_inquiry\\_do\\_harvard\\_and\\_princeton\\_discriminate\\_against\\_asian-american\\_students.html](http://colorlines.com/archives/2012/02/us_dept_of_ed_inquiry_do_harvard_and_princeton_discriminate_against_asian-american_students.html). Countering that, in recent decades, an organized lobby has suggested that “too many” Asians are taking seats that presumably “belonged” to whites. *See* Yi-Chen (Jenny) Wu, *Admission Considerations in Higher Education among Asian Americans*, AM. PSYCHOL. ASS’N, <http://www.apa.org/pi/oema/resources/ethnicity-health/asian-american/article-admission.aspx> (last visited Mar. 11, 2013) (“Ironically, elite college administrators expressed concerns that they may have ‘too many’ Asians enrolled in [the] higher education system.”); Scott Jaschik, *Is It Bias? Is It Legal?*, INSIDE HIGHER ED (Feb. 3, 2012, 3:00 AM), <http://www.insidehighered.com/news/2012/02/03/federal-probe-raises-new-questions-discrimination-against-asian-american-applicants#ixzz2LqRjN9uR> (“Many advocates for Asian-American students believe that some elite college admissions officers use phrases like ‘well-rounded’ to favor white applicants of lesser academic quality over Asian-American applicants.”); Daniel de Vise, *Student Claims Harvard, Princeton Discriminate against Asian-Americans*, WASH. POST (Feb. 2, 2012, 11:22 AM), <http://www.washingtonpost.com/blogs/> (search for article title; then follow hyperlink) (“Like Jews in the first half of the 20th century, who faced quotas at Harvard, Princeton, and other Ivy League schools, Asian-Americans are over-represented at top universities relative to their population.”) (quoting Golden, *supra*); Golden, *supra* (explaining that Asians must outperform whites in order to gain admission to elite U.S. colleges and universities); Hechinger, *supra* note 7 (“[A]n official at the University of California at Berkeley suggested that Asians should not complain about what they perceived as quotas because this might create anti-Asian feelings.”). *See generally* THOMAS J. ESPESHAD & ALEXANDRIA WALTON RADFORD, NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE (2009). Some white parents claim Asian students have higher test scores, but emphasize that test scores are not dispositive of future success. *See* Suein Hwang, *The New White Flight*, WALL ST. J., Nov. 19, 2005, at A1 (reporting that white parents in certain California communities are moving and quitting the schools “because the schools are too academically driven and too narrowly invested in subjects such as math and science at the expense of liberal arts and extracurriculars like sports and other personal interests”).

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## CONCLUSION

In the years since affirmative action policies were initially crafted and launched, there has been a steady decrease in the percentages of blacks who benefit from the programs. African American enrollment at some of the top law schools in the country has decreased by more than forty percent.<sup>55</sup> Employment data provides a similar conclusion. This data may tell us that affirmative action is already on life support. This short Tribute to Professor Jim Jones asks for the postmortem, urging reflection on what the policies produced so that we can gain a better understanding and fully account for who benefited from the policies and what remains ahead for those yet wishing for inclusion in the American Dream. If the issues are reframed as such, scholars can better understand and calibrate the right questions to ask about affirmative action, its legacy, and what will be the future of remedial efforts to educate a new generation.

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55. *Declining Black Enrollments at Many of the Nation's Highest-Ranked Law Schools*, J. BLACKS IN HIGHER EDUC., Summer 2008, at 10, 10–11.